United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6091

ORIGINAL

To be argued by
ANTHONY J. McNULTY

United States Court of Appeals
FOR THE SECOND CIRCUIT

75 Civ. 2362

RICHARD J. DE FINA,
Plaintiff-Appellant,

against

RITCHEY WILLIAMS, individually and as Chief, Division of Reimbursable Investigations, U. S. Civil Service Commission, ITT FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corp., THOMAS J. MINOGUE, individually and as employee of ITT FEDERAL LABORATORIES, "GEORGE DOE" and "JOHN DOE" whose true names are presently unknown,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES, ITT FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corp., and THOMAS J. MINOGUE in Action No. 75 Civ. 2362

JOSEPH F. ONORATO,
Attorney for Defendants-Appellees,
ITT FEDERAL LABORATORIES and
THOMAS J. MINOGUE
/[illegible]Broadway
New York, New York 10019
Tel. (212) 489-7500

WILLIAM F. McNULTY
ANTHONY J. McNULTY,
Of Counsel

TABLE OF CONTENTS

INDEX OF STATUTE AND CASE CITATIONS

STATUTES

United States Court of Appeals

FOR THE SECOND CIRCUIT

RICHARD J. DE FINA,

Plaintiff-Appellant,

against

RITCHEY WILLIAMS, individually and as Chief, Division of Reimbursable Investigations, U. S. Civil Service Commission, ITT FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corp., THOMAS J. MINOGUE, individually and as employee of ITT FEDERAL LABORATORIES, "GEORGE DOE" and "JOHN DOE" whose true names are presently unknown,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES, ITT FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corp., and THOMAS J. MINOGUE in Action No. 75 Civ. 2362

Introductory Statement

Fortunately, as the Court will see when it examines the Plaintiff-Appellant's Brief herein, the issues raised by his appeal in Action No. 75 Civ. 2362—which is the only action involving the Defendants, ITT Federal Laboratories, a Division of International Telephone and Telegraph Corp., and Thomas Minogue, in which the Plaintiff is appealing to this Court—are extremely limited.

The Plaintiff appeals from a Judgment and Order, made on May 18, 1976, by Hon. Whitman Knapp in the United

States District Court for the Southern District of New York, and thereafter entered on May 25, 1976, in the Office of the Clerk of said Court, which, among other things, dismisses his complaints against the defendants, ITT Federal Laboratories, a Division of International Telephone and Telegraph Corp. (hereinafter referred to as ITT) and Thomas J. Minogue, individually and as an employee of ITT, for lack of jurisdiction (JA 49).*

The plaintiff's complaints against ITT were dismissed for lack of federal subject matter jurisdiction based on diversity of citizenship on the ground that it is undisputed that said defendant's "principal place of business is New York, the state of residence of the plaintiffs as well" (JA 24), and his complaints against Minogue were dismissed for lack of *in personam* jurisdiction over said defendant under New York's "long-arm" statute (Section 302 of the New York Civil Practice Law and Rules, JA 41, JA 49).

If this Court determines that these complaints were properly dismissed by District Judge Knapp on jurisdictional grounds, then there must, of course, be an affirmance of the judgment of dismissal as against ITT and Minogue in this action.

Although much could be said by ITT and Minogue about the nature and temper of this exasperatingly involved litigation—which must surely have tested the patience of District Judge Knapp and his staff to the breaking point—said defendants would much prefer to leave any such comments to be made by one of the other appellees, on behalf of whom it is understood the United States Attorney has been granted an extension of time within which to serve and file their briefs. Suffice it to say that, were it not for the lucid memoranda of District Judge Knapp herein and the final judgment entered thereon, it is doubtful whether

---

* Unless otherwise noted, all page references in this Brief will be to the Joint Appendix.

anyone reading Appellant's Civil Appeal Pre-Argument Statement or Brief herein would be able to determine what the case is all about.

Question Presented

The sole question raised by the appeal from the judgment of dismissal herein as against ITT and Minogue is:

> Was said dismissal properly ordered by the District Court on jurisdictional grounds?
>
> The Court below answered this question in the affirmative (JA 49).

Relevant Facts

As already noted, there is no need for ITT and Minogue to discuss the plethora of claims and counterclaims asserted by the plaintiff in any of the consolidated actions in which he is appealing herein, save Action No. 75 Civ. 2362, in which his complaint was dismissed for lack of *in personam* jurisdiction over Minogue and lack of subject matter jurisdiction over ITT.

The action against ITT was commenced by the service of a summons and amended complaint on or about May 19, 1975, and the action against Minogue was commenced by personal service of a summons and amended complaint on him in National City, California, on September 22, 1975 (JA13, JA42). Said defendants served and filed their respective answers in or about September and October of 1975 (JA13).

Despite what the plaintiff may now say in his brief about his cause of action against ITT conferring "original jurisdiction" on the United States District Court in Action No. 75 Civ. 2362 because "The action against the defendant ITT Federal Laboratories was a *Federal Question*" (App's

Br., p. 55, emphasis his), as the Court will see when it reads his amended complaint herein, seeks to recover common-law damages for defamation, which is what the District Judge found (JA41-JA42).

In his complaint, the plaintiff, Richard J. De Fina, who it is alleged in paragraph II(2.) thereof, "resides at 220-31 Union Turnpike, Flushing, New York and has an Associate Degree in Electronics", claims, in brief, that, because ITT—a former employer of his, through unidentified employees ("George Doe" and "John Doe") as well as through its Director of Industrial Relations in its Nutley, New Jersey office, the defendant, Thomas J. Minogue—deliberately over a period of some three or four years conspired against him to falsify his employment records kept by ITT so as to make it look like De Fina himself had given false information about the dates of his prior employment with ITT to the United States Civil Service Commission—which was conducting a field investigation of his background in connection with a Sky Marshal's job he was being trained for by the U. S. Customs Department in February of 1971—he not only was unjustly forced to resign as a Sky Marshal trainee on February 10, 1971, (after being erroneously told by his superiors thereat that he would be dismissed if he did not resign because his eye-sight was substandard), but he was also denied employment by the federal Drug Enforcement Agency in 1973 and by the Federal Aviation Administration in 1975, and other unnamed Federal agencies, because he had been "black listed."

It is respectfully submitted that, if these claims appear to be a bit confusing, it is because that is precisely the way they read. The important point for this Court's consideration on the present appeal, however, is that the gravamen of De Fina's amended complaint against ITT and Minogue (sometimes spelled "Monogue" therein) is to recover $1,000,000.00 in compensatory damages against ITT and Minogue for both libel and slander (the claimed slander has something to do with aspersions allegedly cast by ITT and

Minogue upon De Fina's sister, Madeline De Fina, who is representing him herein as his attorney) and to recover punitive damages against Minogue.

After the Government moved in the related actions brought by De Fina against other federal agencies under the new Freedom of Information Act to consolidate those actions with the defamation action brought by him against ITT and Minogue (which motion was granted), ITT moved to amend its answer to assert the affirmative defense of lack of jurisdiction and to dismiss Action No. 75 Civ. 2362 for lack of diversity jurisdiction (JA 17-JA18). Minogue, by his First Affirmative Defense to the amended complaint, asserted "That this court has no jurisdiction over his person said defendant being a bona fide resident of the State of California and was not served within the jurisdiction of this court" (Para. "TWELFTH" of Minogue's answer to the amended complaint).

Decisions Below

By a Memorandum and Order (#43951), dated February 23, 1976, and duly entered on February 26, 1976, District Judge Knapp—who, because of the number of affidavits filed, treated all motions to dismiss as motions for summary judgment, pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure—dismissed the plaintiff's common-law claims against ITT for defamation for lack of subject matter jurisdiction on the ground that "there is no proffered ground for jurisdiction, save diversity—which ground is untenable in light of the undisputed fact that ITT's principal place of business is New York, the state of residence of the plaintiffs as well" (JA23-JA24).

Although the Court *sua sponte* also dismissed the plaintiff's causes of action against Minogue for failure to allege subject matter jurisdiction against said defendant (JA 24), in the interim it became known that Minogue was, in fact,

personally served with process by a Federal Marshal in Action No. 75 Civ. 2362 in National City, California, on September 22, 1975 (JA 42) and, on a motion for reconsideration of his prior order dismissing as against Minogue for failure to allege diversity jurisdiction, District Judge Knapp then made an order, dated March 15, 1976, vacating said prior order of February 23rd, respecting subject matter jurisdiction over Minogue in related Action No. 75 Civ. 2681, and ordered a hearing to be held on April 9, 1976, to investigate whether he was properly served in said related action (JA 36-JA 38). (It is undisputed that Minogue was personally served and has answered in Action No. 75 Civ. 2362.)

On April 19, 1976, after this hearing into the issue of service upon Minogue in 75 Civ. 2681 was held, District Judge Knapp made another order (# 44268), reproduced on pages 39-41 of the Joint Appendix, in which, after reading the affidavits and other papers submitted to him, he found that Minogue had not been properly served in either Action No. 75 Civ. 2681 or Action No. 75 Civ. 2362 and that, accordingly, the plaintiff's complaints in said actions should be "dismissed for lack of personal jurisdiction" (JA40). The Court's reasoning on the propriety of the actual service of process in Action No. 75 Civ. 2681—which he found improper—did not, of course, apply in Action No. 75 Civ. 2362, wherein Minogue was personally served by a Federal Marshal (JA40, JA42). However, his reasoning as to whether there was any *in personam* jurisdiction over Minogue in either of said actions, on which to base personal service, was the same in both actions, even if Minogue had been properly served in Action No. 75 Civ. 2681.

In so holding, District Judge Knapp found (JA41):

> *"75 Civ. 2681*
>
> "The evidence before us thus demonstrating that Minogue was never personally served, we must dis-

miss the complaint. Moreover, we are constrained to note that Minogue could not in any event be properly served outside New York. Fed. R. Civ. Proc. 4. The only conceivable jurisdictional basis for service upon Minogue in California is New York's long-arm statute, which specifically exempts actions which sound in defamation. CPLR § 302. There can be no doubt that, as to Minogue, this is such an action.

75 Civ. 2362

"The identical defect exists in this action as well. Although Minogue filed an Answer in this case, he specifically raised the affirmative defense of lack of personal jurisdiction. On the above reasoning, therefore, we must dismiss the complaint as to him in 75 Civ. 2362 as well.

So Ordered."

After the Government in the related Freedom of Information Act actions moved for a reconsideration of what the Court had previously ordered therein, District Judge Knapp then made a further order, also dated April 19, 1976 (#44269), in which he made it clear that "The complaints in 75 Civ. 2681 and 75 Civ. 2362 have been dismissed as to the defendants ITT (decision of February 23, 1976), and Minogue (decision of April 19, 1976)," and directed the Government to "prepare a Proposed Judgment", (JA44-JA45), which was done and which resulted in the final Order and Judgment appealed from herein, dated May 18, 1976, and filed in the office of the Clerk of the District Court, Southern District of New York, on May 25, 1976 (JA46-JA50).

The appeal, as it affects ITT and Minogue, is solely from the portion of said judgment and order as dismisses the plaintiff's complaint against said defendants in Action No. 75 Civ. 2362 on jurisdictional grounds.

FIRST POINT

The plaintiff's causes of action against the defendants, ITT and Minogue, were properly dismissed on jurisdictional grounds.

I.

As against ITT, Federal Laboratories, the corporate defendant sued herein as a Division of International Telephone and Telegraph Corp.,—which, it is undisputed, has its main headquarters in the City of New York—the District Court dismissed D. Pina's claims asserted in his amended complaint on the ground that "there is no proffered ground for jurisdiction" over said defendant, "save diversity—which ground is untenable in light of the undisputed fact that ITT's principal place of business is New York, the state of residence of the plaintiffs as well. Accordingly, the complaints in 75 Civ. 2362 and 2681 as against ITT are dismissed for lack of subject matter jurisdiction" (JA23-JA24).

In his brief the plaintiff makes no attempt to dispute the fact that the damage claims in his amended complaint against ITT do not satisfy the diversity of citizenship requirements for acquiring federal subject matter jurisdiction over said defendant under Section 1332 of Title 28, U.S.C.A. (Judiciary and Judicial Procedure Law).

His only argument in support of his contention that the Court "erred in dismissing the complaint against ITT Federal Laboratories for Lack of diversity jurisdiction" is that "The action against the defendant ITT Federal Laboratories was a *Federal Question* and the Court had original jurisdiction in this case" (App's Br., Pt. III, p. 55, emphasis his). He does not say, however, what this "Federal Question" is under which he seeks to recover against ITT but only asserts that "The federal defendant (Ritchie Williams, the "Chief of the Division of Reimbursable Investigations, U.S. Civil Service Commission,

Washington, D. C.") violated and still violates Richard DeFina's rights under 5 U.S.C. 552 and 552a [Freedom of Information Act] in that with the Court's ruling the false records have been approved for dissemination" (App's Br., Pt. III, p. 55).

Paragraph "18." of the plaintiff's amended complaint alleges:

> "18. That on or about May 14, 1975, plaintiff came into possession of written libels and false statements (See Ex. A1 to A5) made by the defendant, ITT FED LABS, employees acting within the scope of their employment and to bring gain to themselves and to their employer, ITT FED LABS, by joining in a conspiracy of libels, false statements and records to bring plaintiff into public contempt ridicule and deprive him of employment and the right to earn a living in his field of expertise, electronics. The libels were spoken in presence of others, published and read so that plaintiff cannot get employment or a hearing to refute the libels and false records, See Ex. C."

In paragraph "26" of the complaint, which is the ad damnum portion thereof, he alleges against "ALL OF THE DEFENDANTS":

> "26. As a result of the publication of the false and defamatory matter the plaintiff was greatly injured in his reputation, credit, fame, fortune and in his standing in the communities in which he lived and now lives, all to his damages in the sum of $1,000,000.00."

Section 1331(a) of Title 28, U.S.C.A., which sets forth the requirements for the exercise by the United States District Court of original jurisdiction over civil actions involving a "Federal question", reads:

> "§ 1331. *Federal question; amount in controversy; costs*

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

It is clear from the plaintiff's complaint herein that he has no cause of action against ITT under the Freedom of Information Act (Tit. 5, § 552, 552a, U.S.C.A.), since he already admits that he was able to obtain the allegedly falsified and libelous documents maintained by said corporate defendant "on or about May 14, 1975" (Para. 18, Ptf's Amended Complaint).

Although he also attempts in his amended complaint to predicate his causes of action against ITT, for jurisdictional purposes, on "Invasion of privacy, in violation of the IX Amendment of the Constitution of the United States" and on "U.S.C. Title 18, Section 1001, making false records and statements part of a U.S. Civil Service file in pursuance of a conspiracy to prevent plaintiff from obtaining employment with any U.S. Government agency or any other employer" (Para. 1., Ptf's Amended Complaint), neither of these enactments provide a plaintiff in an action of this type with a common-law right to recover damages over against a private corporation for a claimed violation thereof.

It will thus be seen that District Justice Knapp was correct in finding that "there is no proffered ground for jurisdiction, save diversity" in the plaintiff's complaint against ITT and that, since that ground "is untenable" due to a lack of any real diversity of citizenship between the plaintiff and ITT (§ 1332[c], Tit. 28, U.S.C.A.), he had no choice but dismiss the complaint against ITT "for lack of subject matter jurisdiction" (JA24).

II.

As far as the plaintiff's complaint in 75 Civ. 2362 against Minogue is concerned, although there clearly was diversity of citizenship between the plaintiff and Minogue in said action, there was just as clearly no valid predicate for obtaining jurisdiction over the defendant's person by the plaintiff's service of process in National City, California, on September 22, 1975 (JA13, JA42). In so finding, District Judge Knapp held (JA41):

> ". . . we are constrained to note that Minogue could not in any event be properly served outside New York. Fed. R. Civ. Proc. 4. The only conceivable jurisdictional basis for service upon Minogue in California is New York's long-arm statute, which specifically exempts actions which sound in defamation. CPLR § 302. There can be no doubt that, as to Minogue, this is such an action."

Rule 4 of the Federal Rules of Civil Procedure, entitled "Process", states in subdivision (d)(1) thereof:

> "(d) *Summons: Personal Service.* The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive the service of process."

Although this was done in the case at bar with regard to the service of the plaintiff's summons and complaint on Minogue in California, the issue herein is the effectiveness of said service on Minogue for the purpose of acquiring *in personam* jurisdiction over him in this action.

Subdivision (f) of Rule 4 provides:

> "(f) *Territorial Limits of Effective Service.* All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state . . ."

and subdivision (d)(7) provides that for personal service of a summons to be effected:

> "(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

Since there is no Federal statute, other than the above, governing the obtaining of personal jurisdiction over Minogue, the California defendant being sued herein in the United States District Court for the Southern District of New York, the law of New York on acquiring valid personal jurisdiction over said non-domiciliary is applicable (§ 302, 304, and 313 C.P.L.R.).

Section 302(a)(2) CPLR, as amended in 1974, provides in applicable part:

> "§ 302. *Personal jurisdiction by acts of non-domiciliaries*

(a) *Acts which are the basis of jurisdiction.* As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

* * *

2. Commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act . . ."

* * *

"(c) *Effect of appearance.* Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section."

Section 304 CPLR provides that "An action is commenced and jurisdiction acquired by service of a summons," and Section 313 CPLR states:

"§ 313. *Service without the state giving personal jurisdiction.*

A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction."

There is no claim in the case at bar that personal jurisdiction over Minogue was based on the traditional con-

cepts of consistently doing business in New York envisioned by Section 301 CPLR.

Since there can be no doubt that the plaintiff's cause of action against Minogue was one for defamation of character, it is submitted that District Judge Knapp was perfectly correct in dismissing said complaint for lack of valid personal jurisdiction over him on the ground that "Minogue could not in any event be properly served outside New York" under the latter's "long-arm statute, which specifically exempts actions which sound in defamation. CPLR § 302" (JA 41).

The only case that the plaintiff can cite in his brief herein to challenge said dismissal is a Supreme Court decision of former Justice Owen McGivern, at Special Term, New York County, to wit, *Totero* v. *World Telegram Corporation,* 41 Misc. 2d 594 (miscited in Appellant's Brief as p. "504"; App's Br., p. 51), which was rendered in December, 1963, only three months after the effective date of the New York Civil Practice Law and Rules. The quotation taken by the plaintiff from this case, however (*Totero, supra,* 595), is not at all apposite to the jurisdictional facts present in the case at bar. *Totero* holds, among other things, that the New York "single act" long-arm statute (§ 302 CPLR) was constitutional in imposing personal jurisdiction on the syndicated columnist Robert Ruark, in a defamation action, because, although he wrote his articles in Spain and it was his literary agent who was served with process, his practice was to deliver the articles to a syndication distributor in New York, which then distributed them to its own syndication members, one of which was the defendant, New York World Telegram and Sun, which published a claimed libelous article written by Ruark against the plaintiff. The Court based this holding on the ground that this "must be deemed the conduct of business here" and "the action arises out of that business" (*Totero, supra,* p. 595).

It is submitted that, if this is the only case that the plaintiff herein can cite to support his position on the jurisdictional question before this Court, there should be an affirmance, because it is clear from the opinion in *Totero* that Justice McGivern was basing his ruling as much on the traditional concepts of "doing business" in New York under Section 301 CPLR, as he was on the new concept of "transacting business" here under Section 302(a)(1) CPLR. In no fair sense of the term can it be said that the individual defendant, Minogue, while he was in California working for ITT, was "doing" or "transacting" any business in New York under either Section 301 or Section 302 CPLR.

CONCLUSION

The judgment and order appealed from should be affirmed, with costs.

Dated: New York, New York, September 28, 1976.

Respectfully submitted,

JOSEPH F. ONORATO,
Attorney for Defendants-Appellees in 75 Civ. 2362, ITT FEDERAL LABORATORIES and THOMAS J. MINOGUE

WILLIAM F. MCNULTY
ANTHONY J. MCNULTY,
Of Counsel

376—Affidavit of Service by Mail

United States Court of Appeals
for the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Richard J. DeFian
Plaintiff-Appellant
against
Ritchey Williams, individually and as Chief, Division of Reimbursable Investigations, U.S. Civil Service Commission et al.
Defendants-Appellees

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Joseph F. Onorato Esq., being duly sworn deposes and says that he is the attorney for the above named **Defendats-Appellants** herein. That he is over 21 years of age, is not a party to the action and resides at **Levittown, New York**

That on the **29th.** day of **September**, 1976, he served the within

Brief of Defendants-Appellees

upon the ~~Attorneys for the~~ parties and at the addresses as specified below

MADELINE DeFINA ESQ.
Attorney for Plaintiff-Appellant
220-31 Union Turnpike
Flushing, New York

by depositing **3 true copies**
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this **29th.**
day of **September**, 1976

Raymond J. Braddick

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977